PP v. MOHD HUSSEIN MOHD KASSIM

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
[CRIMINAL APPEAL NO: K-05(H)-463-12-2016(MMR)
15 AUGUST 2017

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence – Notice of appeal – Whether filed out of time – Mode of filing – Filing by way of fax transmission – Whether considered as filing of notice of appeal – Whether court official had authority in accepting documents not in accordance with prescribed rules and procedure – Rules of the Court of Appeal 1994, r. 58(1)*

CIVIL PROCEDURE: *Notice of motion – Opposition to – Notice of motion filed to have appeal struck out on ground it was filed out of time – Whether notice of appeal filed one day late – Mode of filing – Filing by way of fax transmission – Whether considered as filing of notice of appeal – Whether court official had authority in accepting documents not in accordance with prescribed rules and procedure – Rules of the Court of Appeal 1994, r. 58(1)*

The respondent was charged with another person for an offence under s. 26H of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 read together with s. 34 of the Penal Code. The respondent pleaded guilty and was accordingly convicted and sentenced to three years' imprisonment effective from the date of his arrest. The Public Prosecutor ('prosecution'), dissatisfied with the sentence imposed, filed this appeal against the inadequacy of sentence passed on the respondent. However, before the appeal could be heard, the respondent filed a notice of motion *vide* encl. 8a to have the appeal struck out on the ground that it was filed out of time. The prosecution opposed the motion on the ground that although the last date for filing the notice of appeal was indeed 12 October 2016, they had sent the said notice of appeal by fax transmission to the High Court on 12 October 2016, which had been duly accepted by the court staff on the same date.

Held (granting motion in encl. 8a; striking out appeal by prosecution)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The facts leading to the motion were not in dispute. The High Court Judge had pronounced the sentence on 28 September 2016. By virtue of r. 58(1) of the Rules of the Court of Appeal 1994, the appeal should have been filed within 14 days, that was, by 12 October 2016. The notice of appeal was only filed on 13 October 2016 as evidenced by the endorsement on the said notice of appeal by the Deputy Registrar of the High Court. This was also duly noted by the judge in the grounds of judgment where he observed that the notice of appeal was filed one day late. (para 3)

(2) The procedure and time period for the filing of criminal appeals were set out in clear terms in r. 58(1) of the Rules of the Court of Appeal 1994. The requirement was clear in that the notice of appeal together with eight copies thereof must be filed in the High Court Registry. There was no provision nor was there any room for interpretation that a fax transmission could be considered as filing of the notice of appeal. If a fax transmission was accepted, it would allow for any appellant to take advantage by first filing the appeal through fax transmission and then taking his or her time to file the appropriate documents to be sent to the Court of Appeal. (paras 7 & 8)

(3) Being a court of record, this court would have to go by the endorsement by the Court Registrar as to the date the notice of appeal was filed. The endorsement stated that the notice of appeal was filed on 13 October 2016 which was a day late. The argument that the notice of appeal by fax transmission was accepted by the court official was without merit as the court official had no authority or discretion in accepting documents not in accordance with the prescribed rules and procedure. In any case, the endorsement by the Court Registrar as to the date of filing indicates that filing was only done on 13 October 2016. There was therefore no such acceptance by the court as contended. Thus, there was no competent appeal herein. (para 9)

Bahasa Malaysia *Headnotes*

Responden bersama-sama seorang lagi, dihadapkan dengan pertuduhan bagi satu kesalahan bawah s. 26H Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 dibaca bersama-sama dengan s. 34 Kanun Keseksaan. Responden mengaku salah dan seterusnya disabitkan kesalahan dan dihukum penjara tiga tahun berkuat kuasa dari tarikh tangkapannya. Tidak berpuas hati dengan hukuman yang dijatuhkan, Pendakwa Raya ('pihak pendakwaan') memfailkan rayuan ini terhadap hukuman tidak memadai yang dijatuhkan. Walau bagaimanapun, sebelum rayuan ini didengar, responden memfailkan notis usul dalam lampiran 8a untuk membatalkan rayuan atas alasan rayuan telah difailkan melebihi had masa. Pihak pendakwaan menentang usul itu atas alasan walaupun tarikh terakhir pemfailan notis rayuan adalah 12 Oktober 2016, mereka telah menghantar notis rayuan tersebut melalui penghantaran faks kepada Mahkamah Tinggi pada 12 Oktober 2016, yang diterima oleh pekerja mahkamah pada tarikh yang sama.

Diputuskan (membenarkan usul dalam lampiran 8a; membatalkan rayuan pihak pendakwaan)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Fakta yang membawa kepada usul tidak dipertikaikan. Hakim Mahkamah Tinggi telah menyebut hukuman pada 28 September 2016. Menurut k. 58(1) Kaedah-Kaedah Mahkamah Rayuan 1994, rayuan

harus difailkan dalam tempoh 14 hari, iaitu, sebelum 12 Oktober 2016. Notis rayuan hanya difailkan pada 13 Oktober 2016 seperti yang dibuktikan oleh endorsmen atas notis rayuan tersebut oleh Timbalan Pendaftar Mahkamah Tinggi. Ini juga dilihat oleh hakim dalam alasan penghakimannya semasa beliau mendapati notis rayuan telah difailkan lewat satu hari.

(2) Prosedur dan tempoh masa pemfailan rayuan jenayah dinyatakan dengan syarat-syarat nyata dalam k. 58(1) Kaedah-Kaedah Mahkamah Rayuan 1994. Keperluan pemfailan notis rayuan bersama-sama dengan lapan salinan dalam pendaftaran Mahkamah Tinggi adalah jelas. Tiada peruntukan dan juga tiada ruang untuk tafsiran bahawa penghantaran faks boleh diambil kira sebagai pemfailan notis rayuan. Jika penghantaran faks diterima, ini membenarkan perayu mengambil kesempatan dengan pertama sekali memfailkan rayuan melalui penghantaran faks dan kemudiannya mengambil sikap sambil lewa untuk memfailkan dokumen-dokumen yang sepatutnya dihantar kepada Mahkamah Rayuan.

(3) Sebagai sebuah mahkamah rekod, mahkamah ini perlu merujuk kepada endorsmen oleh Pendaftar Mahkamah berkenaan tarikh notis rayuan difailkan. Endorsmen menyatakan bahawa notis rayuan difailkan pada 13 Oktober 2016 iaitu satu hari lewat. Hujahan bahawa notis rayuan melalui penghantaran faks diterima oleh pegawai mahkamah adalah tanpa merit kerana pegawai mahkamah tidak mempunyai kuasa atau budi bicara menerima dokumen-dokumen yang tidak selaras dengan peraturan dan tatacara yang ditetapkan. Endorsmen Pendaftar Mahkamah berkenaan tarikh pemfailan menunjukkan pemfailan hanya dibuat pada 13 Oktober 2016. Dengan itu, tiada penerimaan oleh mahkamah seperti yang dihujahkan. Oleh itu, tiada rayuan yang kompeten di sini.

Case(s) referred to:
PP v. Jawan Empaling & Anor [1996] 2 CLJ 328 HC ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26H
Penal Code, s. 34
Rules of the Court of Appeal 1994, r. 58(1)

For the appellant - Wong Poi Yoke; DPP
For the respondent - Jamil Mohamed Shafie; M/s Jamil Mohamed Shafie & Assocs

[Editor's note: For the High Court judgment, please see PP lwn. Mohd Hussein Mohd Kassim & Satu Lagi [2017] 1 LNS 474.]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This is an appeal by the Public Prosecutor against the inadequacy of sentence passed by the High Court at Alor Setar on the respondent. The
B respondent was charged with one other person for an offence under s. 26H of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) read together with s. 34 of the Penal Code. The respondent pleaded guilty and was accordingly convicted and sentenced to three years' imprisonment effective from date of arrest.

C **[2]** The Public Prosecutor, being dissatisfied with the sentence imposed, filed this appeal. However, before the appeal could be heard, the respondent filed a notis usul in encl. 8a to have the appeal struck out on the ground that it was filed out of time. The Public Prosecutor opposed the motion. After hearing submissions, we allowed the motion and struck out the appeal. Our
D reasons for doing so now follow.

[3] The facts leading to the motion are not in dispute. The learned High Court Judge had pronounced sentence on 28 September 2016. By virtue of r. 58(1) of the Rules of the Court of Appeal 1994, the appeal should have been filed within 14 days, that is, by 12 October 2016. The notice of appeal
E was only filed on 13 October 2016 as evidenced by the endorsement on the said notice of appeal by the Deputy Registrar of the High Court at Alor Setar. This was also duly noted by the learned judge in the grounds of judgment where he observed that the notice of appeal was filed one day late.

[4] The Public Prosecutor opposed the motion on the ground that
F although the last date for filing the notice of appeal was indeed 12 October 2016, they had sent the said notice of appeal by fax transmission to the High Court at Alor Setar on 12 October 2016. The Public Prosecutor contended that the said notice was duly accepted by the court staff by the name of Puan Rahayu binti Md Isa on the same date.

G **[5]** The Public Prosecutor also relied on the case of *PP v. Jawan Empaling & Anor* [1996] 2 CLJ 328. In that case, the Public Prosecutor appeared to have filed on time the appeal against inadequacy of sentence. There was, however, a dispute as to whether the petition of appeal had been filed on time. The petition of appeal had been filed by way of fax transmission. The
H High Court accepted that the petition of appeal had been filed on time as the fax copy of the transmission could not be said to have been an unlawful document.

[6] With respect, we do not see how this case assists the prosecution in
I any meaningful way. The issue at hand in the instant application is not whether the fax transmission was lawful or not. The issue is whether the law allowed for the filing of the notice of appeal by way of fax transmission.

[7] In our considered view, the procedure and time period for the filing of criminal appeals is set out in crystal clear terms in r. 58(1) of the Rules of the Court of Appeal 1994 as follows:

> 58. Notice
>
> (1) Within fourteen days of the decision of the High Court or within such extended time as the Court may allow the appellant shall file in the Registry of the High Court at the place where the decision appealed against was given a Notice of Appeal and eight copies thereof. A copy of the Notice of Appeal shall be sent by the appellant to the Registrar of the Court of Appeal.

[8] The requirement is clear in that the notice of appeal together with eight copies thereof must be filed in the High Court Registry. There is no provision nor is there any room for interpretation that a fax transmission can be considered as filing of the notice of appeal. If a fax transmission is accepted, it will allow for any appellant to take advantage by first filing the appeal through fax transmission and then taking his or her time to file the appropriate documents to be sent to the Court of Appeal. It is therefore not surprising that such notices of appeal by fax transmission have been consistently rejected by the courts.

[9] Furthermore, being a court of record, we have to go by the endorsement by the Court Registrar as to the date the notice of appeal was filed. In this case, the endorsement states that the notice of appeal was filed on 13 October 2016 which was a day late. The argument by the learned Deputy Public Prosecutor ("DPP") that the notice of appeal by fax transmission was accepted by the court official is without merit as the court official has no authority or discretion in accepting documents not in accordance with the prescribed rules and procedure. In any case, the assertion by the learned DPP cannot be accepted as the endorsement by the Court Registrar as to the date of filing indicates that filing was only done on 13 October 2016. There was therefore no such acceptance by the court as contended.

[10] What the prosecution ought to have done in this case was to file an application for extension or abridgement of time to file the appeal setting out the reasons for the delay instead of proceeding in this foolhardy fashion of going against settled procedure.

[11] In the circumstances, and for the reasons we have stated, we are constrained to hold that there was no competent appeal before us. Accordingly, the motion in encl. 8a was granted and the appeal by the Public Prosecutor was struck out.